

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 16-11700-smb

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5 In the Matter of:

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7 GAWKER MEDIA, LLC.,

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9 Debtor.

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12 United States Bankruptcy Court

13 One Bowling Green

14 New York, NY 10004

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16 September 28, 2017

17 10:20 AM

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21 B E F O R E :

22 HON. STUART M. BERNSETIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JONATHAN

1 HEARING re Motion of Proposed Amici Curiae Society of
2 Professional Journalists, Reporters Coalition for Freedom of
3 the Press, and 19 Other Media Organizations for Leave to
4 File Memorandum of Law as Amici Curiae

5

6 HEARING re Motion of Ryan Goldberg to Enforce Order
7 Confirming Amended Joint Chapter 11 Plan of Liquidation and
8 (II) to Bar and Enjoin Creditors from Prosecuting their
9 State Court Action

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11 HEARING re Motion of Gizmodo Media Group, LLC to Enforce the
12 Sale Order and to Bar Certain Plaintiffs from Prosecuting
13 Their State Court Actions

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2 Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

MR. GALARDI: Good morning, Your Honor. For the record, Gregg Galardi of Ropes and Gray on behalf the plan administrator. We submitted an agenda to Your Honor and would like to proceed first with the amicus. I think there is a proposed amicus brief and whether they can, in fact, appear on this matter. There is an opposition to that.

THE COURT: Right.

MR. GALARDI: And then the second and third matters, I'd like to ask Your Honor to reverse the order, have the motion to enforce prior to the actual motion of Ryan Goldberg to enforce the order confirming the amended joint plan.

THE COURT: All right. Let me deal with the amicus motion first.

MR. BALIEN: Good morning, Your Honor. My name is Mark Balien of Baker Hostetler. I'm counsel to the amici curiae, the Society of Professional Journalists, the Reporters Committee for Freedom of the Press and 19 other media organizations. I also serve as the outside general counsel to the Society of Professional Journalists, an organization with over 7,000 members nationwide whose mission is dedicated to the perpetuation of a free press as a cornerstone of our nation -- liberty. We seek leave, Your Honor, to file our amicus brief in furtherance of this

1 mission to protect the free press which, in reality, is made
2 up of journalists who individually and collectively
3 research, investigate, report -- and report the news into
4 the public to ensure a well-informed citizenry, a critical
5 component of our self-government. Our proposed brief is
6 short. It's only four and a half pages, and serves to
7 augment the arguments of the movants Ryan Goldberg and
8 Gizmodo Media Group, and to emphasize the critical
9 importance to journalists everywhere of indemnification
10 agreements which in this case are in the form of a release
11 and injunction provisions that effectively replace the
12 journalists' indemnification guarantees.

13 THE COURT: But what does your brief add that
14 hasn't been raised by Mr. Goldberg?

15 MR. BALIEN: Well, essentially I believe we
16 augment the arguments. We emphasize the point that there's
17 -- there are First Amendment interests here. And we --

18 THE COURT: But this is just an issue of whether
19 the plan release provisions preclude the suit in State
20 Court. It's not a First Amendment case. I remember we had
21 this discussion, maybe not with you, but at the confirmation
22 hearing and I approved the release of the writers at that
23 point, but it wasn't a complete release. It carved out
24 willful conduct. It didn't apply to people who were not
25 deemed, whatever that means, to accept the plan, so it's not

1 a complete release and that's the basis of the decision in
2 the case.

3 MR. BALIEN: Right, and frankly I believe it --
4 our brief does address this with respect to those -- they
5 carve out what you just described. The plaintiffs, you
6 know, argue that the carve out applies here but this is
7 based, I believe, on a fundamental misunderstanding of the
8 release provision. In our view, this language is a
9 carryover of the typical language that's incorporated into
10 indemnification agreements, especially ones involving
11 journalists and the media and which would relieve an
12 employer when an employee acts with willful misconduct or in
13 some other egregious manner. It has no bearing on the
14 situation here where the company, in this case Gawker, fully
15 backed this reporter and this reporter's journalism was
16 supported by the company in that instance, and the
17 indemnification provision then would've been fully enforced.
18 He would've been provided indemnification.

19 The issue that they're trying to -- I believe that
20 the plaintiffs in this case are trying to do, they're trying
21 to twist this into some type of actual malice related or
22 other scienter requirement that's required under the libel
23 law, and in our view this is a completely separate issue
24 altogether.

25 THE COURT: Well, he is being accused of an

1 intention tort in State Court, tortious interference with
2 contract, defamation; those are all intentional torts.

3 MR. BALIEN: Right. No, I understand that. But
4 again, when it comes to willful misconduct in that language
5 in the release, it was meant to essentially incorporate the
6 provisions of the indemnification agreements which would
7 provide an employer an out. For an example, about 20 years
8 ago, Chiquita Banana, a company sued -- threatened a suit
9 against Gannet's newspaper in Cincinnati, and they within, I
10 think ten days, literally just days after the publication
11 they were threatened with suit.

12 Gannet settled the case for \$10 million before the
13 suit was even filed, and it turned out that the reporter
14 there was accused of breaking into the phone system of
15 Chiquita Banana's executives and stealing the phone records,
16 the voicemails. In that case, he sought indemnification
17 when he was being pursued and that issue of indemnification
18 came up and there was arguments by the company that that was
19 willful misconduct, and that's where this issue comes into
20 play, it's whether or not this employee has acted outside
21 the bounds.

22 Here, there's no allegations in the complaint, in
23 the State Court action, that the employee has done any of
24 that. There are these conclusory allegations that he
25 engaged in willful misconduct, but there's no factual basis

1 for there to be any finding that there's this type of
2 willful misconduct that the indemnification provisions would
3 address and would ultimately be nullified because of that.

4 THE COURT: Okay. Thank you. Mr. Flaxer?

5 MR. FLAXER: Good morning, Your Honor. Jonathan
6 Flaxer of Golenbock, Eiseman, Assor, Bell, and Peskoe on
7 behalf of plaintiffs. We filed a very, you know, brief
8 opposition. We don't see any relevance here because
9 everything that able counsel just described is all -- all
10 these arguments were made during the plan, you know, a
11 process.

12 Whatever points they made are already baked into
13 the plan and now we're having a debate about parsing the
14 words of the plan, and I don't think any of these other
15 considerations come in at this stage, number one, and number
16 two, I just think this -- these motions were made on August
17 21st to file these papers on late afternoon on Friday, was I
18 think, not the best way it could've been handled, so I think
19 for those reasons the motion should not be granted.

20 THE COURT: Okay, thank you. Look, I'll grant the
21 motion. I'll take the papers for, (indiscernible) the
22 order. Next? You can submit an order.

23 MR. GILHULY: Your Honor, if it pleases the Court,
24 we would like to have the motion of Gizmodo Media Group
25 taken first, to enforce the order, and then --

1 THE COURT: Anyone have a problem with that? All
2 right, go ahead.

3 MR. GILHULY: Thank you, Your Honor. Good
4 morning, Your Honor, Peter Gilhuly of Lathan and Watkins,
5 LLP, on behalf of Gizmodo Media Group, which I will refer to
6 as GMG. With me in the Court today is Thomas Hentoff, a
7 partner at Williams and Connolly, defamation counsel to GMG,
8 who is available to address any detailed single publication
9 rule the Court may have.

10 Your Honor, also in the Court with me is Lynn
11 Oberlander, executive vice president and general counsel of
12 GMG, directly behind me, and (indiscernible), senior vice
13 president and associate general counsel, head of litigation
14 of GMG. Remarkably, Your Honor, the facts in this matter
15 are, I think, entirely undisputed. I think you know the
16 timeframe and I will recite them briefly. I think it might
17 be helpful as background here. As you know, Your Honor, the
18 debtor filed bankruptcy on June 13th, 2016. Ten days later,
19 the article in question was published on June 23rd, was
20 published on the website Deadspin and has remained there
21 without alteration since. On June 27, counsel for the
22 plaintiff sent a letter to Gawker demanding retraction of
23 that story. On July 8th, the Court approved the sales
24 procedure order in this case. On August 16th, the
25 bankruptcy sale auction was held. On August 17th, notice of

1 the bar date and customized proof of claim was sent to
2 plaintiffs. On August 18th, the Bankruptcy Court held the
3 sale hearing in this case, and on August 22nd the -- after
4 GMG was declared the winning bidder, plaintiff's counsel
5 sent a letter to GMG's counsel demanding retraction of the
6 same story. On August 28th, the bankruptcy sale order was
7 entered, and on June 22, 2017, one day short of a year after
8 the article had originally been published, the plaintiff's
9 filed their State Court lawsuit without mentioning
10 bankruptcy sale at all, nothing about the prior history, and
11 on August 21st, GMG filed its motion to enforce the Court
12 order.

13 Your Honor, I don't think that any of those facts
14 are contested, and the plaintiffs don't contest they had
15 actual notice of the sale and that they did not object to
16 the sale.

17 THE COURT: I guess the only question, really, was
18 whether -- I take it that this article is still available?

19 MR. GILHULY: Right.

20 THE COURT: And the only question is whether, like
21 a continuing trespass -- every day it's up there, that's a
22 new tort, and all the parties have cited New York law, so
23 I'd assume everybody was thinking that New York law controls
24 this question.

25 MR. GILHULY: Correct.

1 THE COURT: And I understand the single
2 publication rule which is a rule of statute of limitations.
3 But is there also a rule that the tort occurs with the first
4 publication -- you know, I assume it came up at a time when
5 there was a single publication, the newspaper, but in this
6 day and age, is it still the rule that even if the offending
7 article appears every day for a year on a website that it is
8 still only a single tort that occurs when it first goes up?

9 MR. GILHULY: Absolutely. That is the force of
10 the rule, Your Honor.

11 THE COURT: Well, as I said, has it been applied
12 in a situation that I just described?

13 MR. GILHULY: Philadelphia Newspapers is the very
14 case. It's right on all fours here, Your Honor. It
15 involved a bankruptcy sale, it involved a single
16 publication, it involved a lawsuit in State Court seeking
17 exactly what the plaintiffs are, and it was barred. In
18 fact, Your Honor, I'll read from Philadelphia Newspaper on
19 this very point.

20 "While the articles may remain extant and
21 available online, neither was republished after PMN," who's
22 the purchaser, "became the owner of the papers. Neither did
23 PMN assume liability for defamation claims such as these in
24 the purchase agreement. For that reason, the plaintiffs may
25 not look to the purchaser for any recovery."

1 And this is the law. I mean, that is not
2 surprising at all. That is the force of the law. The New
3 York controlling law, the Firth case, Your Honor, makes that
4 very clear.

5 All right, Your Honor, I'm just going to go in
6 order of the arguments. Your Honor, I think it's very
7 important to note at the onset of this issue, that this is
8 not some secondary or tertiary issue. This issues was core,
9 front and center, in this matter from the beginning, as you
10 will recall from the bankruptcy case, and it was a primary
11 concern of the debtors, you know, to get a free and clear
12 order over these very issues that it's addressed.

13 THE COURT: I don't understand them to be arguing
14 that the free and clear order didn't cut off whatever claims
15 might have arisen immediately prior to the sale order.

16 MR. GILHULY: You're right. I think you're right.

17 THE COURT: I don't understand -- my, as I said, I
18 understand them to be arguing that each day that this
19 information is available is a new tort.

20 MR. GILHULY: Your Honor, here's what I'd like to
21 do. I'd like to go to the issues. I may have Mr. Hentoff,
22 who's an expert on these issues, come and address you on
23 that issue.

24 Your Honor, I think the first thing is
25 jurisdiction. I think it is really beyond argument that the

1 Court's ability to interpret and enforce its argument is a
2 Court proceeding and the Travelers and GM cases make this --

3 THE COURT: You can move on to your next point.

4 MR. GILHULY: Okay. Thank you. I think it's also
5 not disputed, Your Honor, and I'll go through it if you
6 would like, but I do not -- I don't think the plaintiffs are
7 arguing that these are not adverse interests that are
8 otherwise, other than the issue you mentioned, they are not
9 arguing that the sale order doesn't bar pre-sale conduct.
10 So, I could go through that language; it's in our brief. I
11 assume that --

12 THE COURT: I don't understand them, and I'll hear
13 them, but I don't understand them to be arguing
14 (indiscernible) as you just said that the sale order does
15 not cut off -- the free and clear language doesn't cut off,
16 or the successful liability language doesn't cut off that
17 liability, if anything.

18 MR. GILHULY: Your Honor, the other two arguments,
19 before I let Mr. Hentoff address you, are mandatory
20 abstention which I think if you conclude that there's core
21 jurisdiction here, that's the beginning and the end of the
22 argument. There's -- (indiscernible) made that quite clear,
23 and I think there -- at least the other factor in mandatory
24 extension that's not present here is the motion enforce is
25 not solely based on state law. There's just no way to

1 conclude that. This -- you have to interpret the text of
2 the order, the APA, and apply it to this situation, so it
3 just seems to me that mandatory extension is not an issue
4 here. I'm happy to argue further, but it seems to me that
5 that goes nowhere.

6 Your Honor, as to permissive abstention, the Revco
7 and Ionosphere cases that we cite in our brief make it very
8 clear and reflect the wisdom that when jurisdiction plainly
9 exists and there's not mandatory extension does not apply, a
10 Bankruptcy Court should exercise permissive abstention in
11 really rare and unusual circumstances. I -- we don't have
12 that here. In particular, as other Courts have including
13 the WorldCom case, when the 12 factors that you look at for
14 permissive abstention are really weighed heavily in taking
15 this case.

16 First, Your Honor, as I say, this is a core
17 proceeding, the bankruptcy, that is one of the factors, and
18 we are seeking interpretation and enforcement of specific
19 language in a specific word that this Court has entered.
20 The proceeding -- and the proceeding here is the motion to
21 enforce, not the State Court action, Your Honor. The
22 proceeding is plainly related to the bankruptcy case. I
23 would say it's at the core. The solution of this case was a
24 sale to my client. It couldn't be more central to the case,
25 and the Winstar case, you know, found that when a sale is

1 subject of the proceeding, was a central aspect and basic
2 function of the bankruptcy proceedings, you know, this is
3 when you do not abstain.

4 And related, Your Honor, the factors -- non-
5 bankruptcy law does not predominate over bankruptcy issues
6 and the relevant non-bankruptcy law is well settled. I
7 mean, just take the second one first. Mr. Hentoff is going
8 to tell you that the single publication rule is very well
9 settled. There are not -- I mean there is -- the
10 Philadelphia Newspaper case cites the Firth case for things
11 like the fact that the first single publication rule applies
12 to the internet, posting on the websites.

13 It also cites, Philadelphia Newspaper sells the
14 seminal New York Firth case on the fact that links directing
15 to -- people to know where the article is published is also
16 not a valid argument for undoing the single publication
17 rule. So, I will submit, and Mr. Hentoff will talk to you -
18 - address you on this, that the single publication rule is
19 well-settled law in New York. It's not a complicated
20 analysis.

21 With respect to non-bankruptcy law not
22 predominating, Your Honor, to resolve our motion you need to
23 basically analyze Section 363, the text of the court order
24 which refers to the APA, and the single publication rule.
25 They all come together, but there is -- it's fundamentally a

1 bankruptcy issue. Given this Court's familiarity with its
2 own sale order, the bankruptcy code, and the factual
3 underpinnings of the bankruptcy case, the Court is best
4 positioned to adjudicate this motion. A State Court judge
5 would not understand, you know, the complexities of
6 bankruptcy law here and what the intent behind the order is.

7 THE COURT: I'm not sure I do but that's
8 (indiscernible).

9 MR. GILHULY: Your Honor, the idea what GMG forum
10 shopped is completely ridiculous. Where else were we going
11 to go to enforce this Court's order, but this Court? And
12 there's obviously no right to jury trial implicated in the
13 motion to enforce a court order. I really don't think, Your
14 Honor, it's feasible to sever the claims, and this motion
15 doesn't burden this Court. This Court is the right place
16 for this to get resolved, and I would submit to Your Honor
17 that the efficient administration of the estate would be
18 well served by, instead of going to other Courts, for you to
19 resolve this today.

20 Your Honor, and the fact that the plaintiffs and
21 GMG are non-debtor parties, that's true in every sale
22 context when you're trying to enforce a sale order. You
23 don't have to enforce it against the debtor usually, you
24 have to enforce it against third parties. So, I would say
25 the overwhelming majority of factors weigh in favor of you

1 not abstaining here, Your Honor, and, look, this case
2 involves, you know, a garden variety motion to enforce a
3 sale order. The Court clearly has jurisdiction to enforce
4 its own order. The sale order clearly bars pre-sale claims
5 against GMG, that's not disputed.

6 The single publication rule, as you will hear,
7 dictates that the article in question has been published
8 once by Gawker and has not been republished. Mandatory
9 abstention is completely inapplicable here and permissive
10 abstention is imprudent. As Judge Gerber said in the motors
11 liquidation case, the construction and enforcement of
12 Bankruptcy Court orders is important to the bankruptcy
13 system. This is simply not the right case to erode
14 confidence in the basic bargains struck often in 363 sales.

15 Your Honor, with that I'm going to defer to Mr.
16 Hentoff to address the single publication issue.

17 THE COURT: Thank you.

18 MR. HENTOFF: Good morning, Your Honor. May it
19 please the Court, Thomas Hentoff.

20 The -- I have four points to make, Your Honor. I
21 think the first point, the question the Court made is, is
22 this a continuing tort. And the answer is, that's the
23 question that the New York Court of Appeals decided in the
24 Firth case in 2002, that in a defamation the fact that an
25 article, or the case of Firth is was a report, remains

1 online so that people can see it and visit it day after day
2 after day, the New York Court of Appeals said that's not a
3 continuing tort.

4 We're going to apply the standard single
5 publication rule that applies in defamation cases generally,
6 and we're going to apply it online and then courts all over
7 the country followed Firth and applied the same rule. In
8 fact, I would say the best way to understand the single
9 publication rule is, it is the opposite of a continuing
10 tort, and I think a good example of that would be imagine an
11 article that's on a website that a plaintiff claims is
12 defamatory and at the same time there's a photograph that's
13 embedded in that article that the photographer said, "You
14 didn't pay me for it, this is a copyright infringement."
15 Well, copyright infringement, not going to make an
16 (indiscernible) addition for some other case in the future,
17 but copyright infringement is understood to be a continuing
18 tort and so that photograph every day that it continues to
19 be distributed to people, that can be a new cause of action.
20 But under the standard single publication rule, as applied
21 on the internet by Firth and all the cases, it's the
22 opposite of a continuing tort and it's a single unitary
23 publication.

24 Now, my second point, Your Honor, is this is not
25 simply a rule that's applied in the statute of limitations

1 context. It is often applied in the statute of limitations
2 context, but in defamation law. it's also very important
3 and comes up a lot on state of mind because under the actual
4 malice test that's a default standard for public figures and
5 in New York State under the gross irresponsibility test
6 which is the standard for matters of public concern where
7 you don't have a public figure, there's a big question.
8 what did the defendant know? What was in their mind at the
9 time of publication? And if not for the single publication
10 rule, every day that an article is on a website or continues
11 to be distributed, the defendant arguably is getting more
12 and more information and their state of mind always changes.
13 But the courts have been very clear.

14 We don't look at the defendant's state of mind
15 after the first time the article goes on the website, so
16 it's not just a statute of limitations rule, it's a unitary
17 publication rule that applies in a number of contexts. So
18 in our motion, we cited the Bureau of Conde Nast case for a
19 different proposition, but that's a case in which the Court
20 held for actual malice purposes you can't look beyond the
21 first posting of the article on the website.

22 And then finally, as Mr. Gilhuly said, in
23 Philadelphia Newspapers which just applied the general law,
24 at least one of the plaintiffs in that case had filed
25 lawsuit within a year of the original article being

1 published. So, Philadelphia Newspapers is not a statute of
2 limitations case, it's a unitary publication case.

3 And then just my final point, is the law is clear
4 on this. There are no exceptions that could be applied
5 here. The plaintiffs are asking for an exception when
6 there's a change in ownership of the company that owns the
7 website. As we say in our papers, Philadelphia Newspapers
8 applied regular law and rejected that argument.

9 And then finally as we note in our reply brief, it
10 would be a really bad exception to make to the single
11 publication rule because you could have, as we note, like
12 the Daily News was recently sold to the Tribune Company
13 which permits New York institution to continue, all the
14 people who are employed by it to keep their jobs, but if
15 that had been a republication, then I don't know, 50, 60, 70
16 years of archives from the Daily News would be subject to
17 new statute of limitations and people wouldn't be in a
18 position to engage in transactions for media companies
19 because they'd be afraid that any new transaction, you've
20 got liability for things that have been up for 10, 20, 30
21 years. So, it's -- there is no exception to the law and it
22 would be a bad idea to make one. Thank you.

23 THE COURT: Thank you, (indiscernible).

24 THE COURT: Oh, sure. Go right ahead.

25 MR. GALARDI: Your Honor, again, we have the

1 Gawker and the plan administrator. We joined this motion.
2 I do want to, as the historian of the case, remind Your
3 Honor of this actual sale proceeding.

4 As you may remember, we filed a reply in support
5 of the single publication rule. There were a number of
6 people represented by the exact same counsel in that. Mr.
7 Harder, who had said reservation of rights. We had come in
8 and argued that single publication rule would protect the
9 successive buyer because that was part of the significant
10 value and we'd had a number of the negotiations regarding
11 that.

12 The plan administrators here are prepared to
13 testify, but I think the facts are uncontroversial that when
14 we sold, we took the view that this was a single
15 publication, that their acquisition would not be considered
16 a new publication, but all that Ms. (indiscernible) and Mr.
17 -- Dr. (indiscernible) did was file a reservation of rights.
18 Your Honor and I had this dialog about, can I overrule --
19 can you overrule a reservation of rights. You said no, but
20 that was an issue that Your Honor was going to interpret on
21 the successor at some date, but it was the exact issue that
22 we'd raised here. The counsel was the exact same counsel.
23 They did not raise that issue and did not fight that issue,
24 they just simply did -- laid in wait, so I just wanted to
25 remind Your Honor about that. We did take the position with

1 both buyers at that time that this would be covered by the
2 single publication rule for the reasons the gentleman from
3 Williams and Connolly argues, as this is not continuing
4 tort. Thank you.

5 THE COURT: Mr. Flaxer?

6 MR. FLAXER: Like Mr. Gilhuly, I am not an expert
7 on the single publication rule either or, you know, New
8 York's law about defamation. My partner, Mr. Ricardo was
9 here and if Your Honor wishes to hear more about that, he's
10 here to speak to those issues. I may allude to them a
11 little bit, but I'm certainly not the expert.

12 I find myself in agreement with much of what Mr.
13 Gilhuly said, but when you get to nub of the issue we're --
14 we have opposite views.

15 THE COURT: What's the nub?

16 MR. FLAXER: The nub is that the basic question
17 that's raised here is whether the New York State Court where
18 the action is pending or this Court will decide a complex,
19 multilayered disputed issue of New York law.

20 THE COURT: But how do I avoid doing that in order
21 to interpret the sale order?

22 MR. FLAXER: Because, well, I think that's the
23 nub. You can't interpret, in quote, because the reality is
24 you're not being asked to interpret the sale order. The
25 sale order was clear. What they've done is instead of going

1 to State Court and either raising this issue there --

2 THE COURT: Well, they're saying I don't have to
3 do anything.

4 MR. FLAXER: They could've gone to a State Court
5 but they didn't. They decided to come here on what we think
6 is a fundamental misdirection.

7 THE COURT: So, what's the issue that the State
8 Court should decide?

9 MR. FLAXER: The State Court is going to have a
10 trial with discovery and witnesses on this defamation claim
11 and on the intentional tort claims.

12 THE COURT: But isn't one of the purposes of the
13 provisions of the sale order to cut off that claim before
14 you get to discovery and all that other stuff?

15 MR. FLAXER: If it is, it's not in the sale order.
16 We didn't participate at all. We are listed as a -- having
17 a disputed claim.

18 THE COURT: Are you saying you're not bound by the
19 sale order?

20 MR. FLAXER: No, I'm not saying that, but what I'm
21 saying is that when you analyze the jurisdictional and
22 abstention questions in the extent of your power, the fact
23 that we did not file a claim, that was submitted to the
24 jurisdiction of the Court, and never participated in any way
25 in the proceedings before this Court affects how you view

1 the extent of your power here and the appropriate exercising
2 of your power.

3 THE COURT: Do you contend that the sale order
4 doesn't cut off pre-sale claims?

5 MR. FLAXER: Absolutely not. The sale order --

6 THE COURT: Okay, so isn't the only issue whether
7 you're complaint alleges post-sale claims?

8 MR. FLAXER: No. The issue is -- our complaints
9 on its face clearly only seeks redress for post-sale
10 conduct.

11 THE COURT: I disagree. Your complaint, the
12 material facts, are alleged starting in Paragraph 16 but
13 mostly 17 to 20, which talk about the June 23rd, 2016,
14 article written by Mr. Goldberg which is the article at
15 issue.

16 Then when I get to the defamation claim, which is
17 -- starts at Paragraph 42, says that defendants published or
18 caused to be published on or -- and/or maintained defamatory
19 statements in a story against them as described in
20 Paragraphs 17 through 20.

21 So, if I'm a State Court judge looking at this and
22 I know nothing about the bankruptcy, case it looks to me
23 like your arguing that whatever wrong occurred, occurred on
24 June 23rd and you just told me that that would be barred by
25 this free and clear and successor liability provisions of

1 the sale order.

2 MR. FLAXER: You know, I think the answer is that
3 you can't frame the complaint without explaining the
4 background facts and the circumstances.

5 THE COURT: So, where does it talk about the
6 bankruptcy and the sale order and that you're only suing for
7 claims that arose after the sale order, which would be
8 clearer to the judge who had to handle this in State Court?
9 Then they could make a motion to dismiss saying there were
10 no such claims.

11 MR. FLAXER: You know, I --

12 THE COURT: Mr. Flaxer, I've read it and it's not
13 in there.

14 MR. FLAXER: Okay. No, I'm sure there's nothing
15 in here about --

16 THE COURT: All right.

17 MR. FLAXER: -- the bankruptcy or the sale order
18 or any of that. I'm looking at the prayer for relief which
19 is on Page 19, and in 3 it seeks an order enjoining
20 defendant from publishing, continuing to publish, or
21 republish, and the defendants are the only defendants in the
22 case.

23 THE COURT: I always thought the wherefore clause
24 wasn't part of the plea.

25 MR. FLAXER: I know, but we're trying to

1 understand what is being sought here. Here's -- the only
2 defendants are the buyer.

3 THE COURT: I know what you're -- I know what's
4 being sought, but the question is, at least the way the
5 complaint frames it, is that it's being sought for a wrong
6 that occurred on June 23rd prior to the sale. That's the
7 problem I have with the complaint.

8 MR. FLAXER: I --

9 THE COURT: And you can argue this 'til you're
10 blue in the face to a State Court judge and he or she would
11 probably tell you to come back here to do it.

12 MR. FLAXER: You know, I severely doubt that, but
13 you know, at that point, it could be explained to the State
14 Court which is where this belongs, that no, to the extent
15 that you want us to amend the complaint to make that clear
16 we're happy to do that. The only relief sought is against
17 these defendants for post-sale conduct.

18 THE COURT: But you said these defendants
19 published something, and they didn't publish anything. It
20 was Gawker that published it, their successors.

21 MR. FLAXER: There is this concept embedded in the
22 New York law, that I'm not the expert on, about --

23 THE COURT: But you're going to tell me about it
24 anyway, right?

25 MR. FLAXER: -- about the concept of a

1 republication and as Mr. Ricardo will explain to you, that
2 is not a simple issue. New York State, unlike Pennsylvania,
3 has not adopted the uniform single publication act. New
4 York has decided to go its own way and develop its own
5 common law about single publication, republication, and all
6 the very complicated issues that surround this. I don't
7 think you want to be the judge to have to guess how a New
8 York State Court would decide to develop this law that's
9 also always changing and subject to reevaluation.

10 THE COURT: But I'm being told there's a New York
11 State Court of Appeals (indiscernible) case that's
12 essentially on point.

13 MR. FLAXER: Okay, well my partner -- I mean, if
14 you want him to speak to that now, I'll bring him up here.

15 THE COURT: It's your show.

16 MR. FLAXER: All right, well, why don't I keep
17 going through my argument and then --

18 THE COURT: Okay, go ahead.

19 MR. FLAXER: -- then we'll get to that. So, I
20 think the notion of casting this as a motion to enforce or
21 interpret your order is superficial. There's nothing in the
22 order that is alleged to be ambiguous, and --

23 THE COURT: But, won't that make it easier to
24 enforce?

25 MR. FLAXER: No, because the -- I -- we don't

1 believe there's anything for you to enforce except if you
2 would like to read the relevant provisions of the order into
3 the record and then send us back to State Court. Because
4 the order, like -- (indiscernible) like most sale orders
5 I've seen, they all say this applies up to the date of the
6 sale and applies to all pre-sale conduct but doesn't bar
7 post-sale conduct, and we --

8 THE COURT: I don't think anybody's in
9 disagreement (indiscernible) that.

10 MR. FLAXER: And so the only way you would ever
11 get to an issue about how -- about whether you should
12 enforce your order, is for you to substitute yourself for
13 the New York State Court System on the issue of single
14 publication and republication, and now we'll quit that,
15 leave it at the side for the moment. But I will say that in
16 addition to the lack of dispute about what the order says on
17 this issue, there's no issue of bankruptcy law that you're
18 being asked to decide or think about. This doesn't
19 implicate 363 or any of that. There's nothing in the
20 bankruptcy code that this dispute would call upon you to
21 have to --

22 THE COURT: But in light of that, can't I just
23 read the complaint for the reasons I said and say this is
24 complaint asserts a pre-sale claim. Because that's the way
25 it's pleaded.

1 MR. FLAXER: I think you could do that, but I
2 think you'd be elevating form over substance. I think the
3 only defendants are the ones who are named in the complaint
4 and I will represent to the Court right now that we seek
5 nothing from the estate, from the debtor, or for any pre-
6 sale conduct. It's just that you need to recite the
7 background to get to where you need to go, and I -- and we
8 understand. One argument that I'm guessing they would make
9 in State Court is, okay, because of the way you set this up,
10 you can't seek any damages for anything that happened prior
11 to the sale date, and you know what? That's right. That is
12 --

13 THE COURT: I think they're going to say you can't
14 seek any damages because whatever was done was done before
15 the sale.

16 MR. FLAXER: Well, they're going to say that as
17 well. But on the first -- but that one, we think they're
18 going to lose. But we understand we have a problem, an
19 issue. I don't want to say the word problem, it's an issue,
20 on the second.

21 We think the case law is clear that by simply
22 characterizing something as a motion to interpret or enforce
23 an order, doesn't mean that all considerations of
24 jurisdiction and the power of the Court suddenly go out the
25 window, the Court has to look at the substance of what is

1 really -- what the Court's really being asked to decide.

2 THE COURT: You're saying that if someone were to
3 claim post-confirmation let's say, maybe this is the other
4 case, it's clearly barred by the terms of the release,
5 discharge, or whatever that this Court would have no
6 jurisdiction and if somebody aggrieved by that lawsuit came
7 in and wanted to stop it because it violated the
8 confirmation (indiscernible), they'd have to go to State
9 Court and show them what the confirmation order says and
10 tell the State Court judge to figure it out?

11 MR. FLAXER: You know, I think that's too generic.

12 THE COURT: Well isn't it what's happening here?

13 MR. FLAXER: No. This is total -- I don't agree.
14 It's totally fact intensive. If you accept my, you know,
15 credits.

16 THE COURT: What are the disputed facts, though.

17 MR. FLAXER: In -- on.

18 THE COURT: In other words, the article is still
19 published, the sale occurred. Isn't just purely a legal
20 question whether this there's a separate claim?

21 MR. FLAXER: No, and again as the non-expert, I
22 will --

23 THE COURT: Well, maybe I ought to hear from --
24 let me hear from the expert.

25 MR. FLAXER: All right. But there are several

1 layers of issues that are going to require discovery. So,
2 we view this as not being -- as this Court not having
3 jurisdiction --

4 THE COURT: I just don't -- I'm sorry, I just
5 don't understand that. You may think that the State Court
6 is a better place to answer the question, but I don't know
7 how you can say I don't have jurisdiction to enforce the
8 sale order.

9 MR. FLAXER: If someone was seeking to enforce the
10 sale order in real substance as opposed to using the notion
11 of enforcing a sale order to move a state law dispute
12 between non, you know, debtors that has no effect on the
13 bankruptcy estate, to this Court, you know, you got to look
14 to the substance. I view their position as elevating form
15 over substance. There's no dispute any provision of the
16 sale order. It otherwise has no effect on the bankruptcy
17 estate. It doesn't arise under the code. We don't think,
18 again --

19 THE COURT: -- you disputing that the sale order
20 cuts off the claim that you say you're asserting?

21 MR. FLAXER: Am I asserting that --

22 THE COURT: You're saying that the sale order
23 doesn't cut it off, right? And they're saying it does.
24 That sounds like a dispute over the sale order.

25 MR. FLAXER: No, it's -- well, that's where I

1 think you're elevating form over substance. It's a dispute
2 over an issue of purely state law. If they win in State
3 Court, then they will have established that the sale order
4 should cut the claim off, but at that point it's moot. It
5 never comes back here because if we lose on that issue, we
6 lose anyway.

7 THE COURT: Okay. I got it. Thank you.

8 MR. FLAXER: So, on mandatory abstention, assuming
9 you concede that it is related to the bankruptcy case, which
10 we dispute, but if it is, there's no dispute that an action
11 has been commenced. You know, notwithstanding their
12 argument that this is about -- it's about their motion to
13 enforce the order. The action is clearly the State Court
14 action. We're the ones who are raising mandatory abstention
15 (indiscernible) then you should abstain from getting --

16 THE COURT: How would you demonstrate

17 MR. FLAXER: -- State Court --

18 THE COURT: How would you demonstrate it if the
19 case can be timely adjudicated in State Court? I don't have
20 any statistical information.

21 MR. FLAXER: Well --

22 THE COURT: That's how you prove it.

23 MR. FLAXER: I'll say two things on that. I mean,
24 we've raised it. They haven't said it can't be. We could
25 have a hearing on that. This isn't an evidentiary hearing.

1 There are no, you know,

2 THE COURT: I know you didn't have an evidentiary
3 hearing. State Courts and the Federal Courts publish
4 statistics in terms of clear -- I just had a case like this,
5 clearance rates and caseloads and things like that. It's
6 all published statistics.

7 MR. FLAXER: I mean, my view is we raised it, they
8 didn't

9 THE COURT: But you have to --

10 MR. FLAXER: -- oppose it.

11 THE COURT: -- sustain your burden of proof. All
12 right. All right. I got it.

13 MR. FLAXER: So, their only pushback on mandatory
14 abstention goes back to that they think this is about your
15 somehow interpreting the sale order, and we, for reasons
16 I've stated and won't state again, don't agree.

17 THE COURT: (indiscernible)

18 MR. FLAXER: Rather than pick through all of the
19 standards of permissive abstention which Your Honor is very
20 (indiscernible) with as is my adversary, we think the non-
21 bankruptcy issues predominate over the bankruptcy issues.
22 We don't think there are any bankruptcy issues whatsoever.
23 As my partner will explain, we think the single publication
24 rule issues are very complex, unsettled, will require
25 discovery, and are items that belong in the New York State

1 Court for reasons I've already stated so I won't state them
2 again.

3 We also think it would be inefficient for Your
4 Honor to take this on. That jumps ahead a little bit to the
5 extent that the power of the Court and whether you can
6 finally decide this or could only issue findings and
7 conclusions, but that again gets into the judicial
8 efficiency prong. From my clients' perspective, they're
9 being damaged every day that this article stays up, and we
10 see the possibility of very protracted litigation in this
11 Court. If I convince Your Honor that it's necessary to take
12 discovery on the state law issue and you decide to do it
13 anyway, if you agree with us, then we're going to start from
14 scratch in State Court all over again and we're going to
15 lose a lot of time. If it goes to the State Court, it only
16 gets resolved once and it's finished.

17 It was a very good quote in the Casual Male case
18 which we cited about how the New York State Courts have a
19 significant interest with the laws of different -- the laws
20 of the various states are different. We think that's
21 implicated here. You know, I think what they seek is
22 difficult to square with the Second Circuit's decision in
23 Orion. I guess what they're suggesting is that you can, I
24 guess make some limited finding, a non-binding finding on
25 the single publication rule.

1 THE COURT: But that was a summary procedure
2 whether or not the debtor could, if (indiscernible) reject
3 the agreement with Showtime. This isn't a summary
4 procedure. I'll decide this, and it's not -- you know, if I
5 decide that it violates the sale order, for example, I'll
6 enter an injunction. Not going to be a summary procedure.

7 MR. FLAXER: I guess what's bothering me is the
8 issue of in a proceeding that is unique to this case,
9 whether you can finally decide a state law dispute between
10 non-debtors wherein -- this is where the fact that we never
11 filed the claim, I think, does have an effect. Where once
12 of the parties is basically a stranger to the bankruptcy
13 case in terms of its own --

14 THE COURT: But --

15 MR. FLAXER: -- conduct whether you're in the
16 position or whether it was appropriate for you to finally
17 decide that issue particularly where --

18 THE COURT: You just told me you were bound by the
19 sale order, though. I don't understand that argument. Sale
20 order was an in rem order which has obviously an effect on
21 everyone's in personam rights. If you're bound by the sale
22 order, you're bound by the sale order the same as the debtor
23 is bound by the sale order, and the purchaser.

24 MR. FLAXER: Except that your -- the way you frame
25 it, assumes the conclusion or assumes the resolution of the

1 fundamental issue of New York State law --

2 THE COURT: No.

3 MR. FLAXER: -- that you shouldn't be getting into
4 in the first place.

5 THE COURT: You may be right, but I -- that's a
6 different issue from whether you're bound by the sale order.

7 MR. FLAXER: So, I think they're not inconsistent.
8 I can concede --

9 THE COURT: Do I really have to decide all this,
10 though? I look at the complaint. You're alleging a tort
11 that occurred on June 28th.

12 MR. FLAXER: Again, if you wanted to go that way,
13 I think it would be a mistake because I think you'd be
14 elevating form over substance. We need to recite the
15 background, but I'm telling you here today that this
16 complaint is only against these defendants and it only seeks
17 relief for post-sale conduct.

18 THE COURT: So, in reciting the background, why
19 didn't you recite the sale and make that clear?

20 MR. FLAXER: You know, if you ordered us to amend
21 the complaint to do that, we would do it.

22 THE COURT: I'm just going to read the complaint.
23 That's all I have before me.

24 MR. FLAXER: I -- you know --

25 THE COURT: You want to amend your complaint?

1 MR. FLAXER: If it would get me out of this Court,
2 I would.

3 THE COURT: Time is going to get you out of this
4 Court, because I have a very crowded Courtroom, so why don't
5 you wrap it.

6 MR. FLAXER: Okay. You know, I'm hoping you're
7 not listening too much to a lot of the background noise
8 about how we laid in wait and we should've done something in
9 the Bankruptcy Court --

10 THE COURT: No, no, it's a straight question.

11 MR. FLAXER: All right.

12 THE COURT: Whether the claim is cut off by the
13 sale order; that's it.

14 MR. FLAXER: I can go into --

15 THE COURT: And as I said, you're as bound as the
16 debtor and the buyers are to that sale order, which you
17 apparently admit most of the time.

18 MR. FLAXER: For purposes of this hearing, I'm not
19 debating the enforceability of the sale order. What I'm
20 saying is that the sale order is abundantly clear that it
21 does not bar claims for post-sale conduct.

22 THE COURT: No question about that. I don't think
23 anybody's arguing that it does.

24 MR. FLAXER: Right. We agree on that, and we're
25 only --

1 THE COURT: But you're alleging a pre-sale tort.

2 MR. FLAXER: I -- as the representatives of these
3 parties here today, I'm here to tell you that that is not
4 true. We are -- what we're really after for the most part,
5 I'm not waiving anything. This is about getting that
6 article taken down.

7 THE COURT: I understand. No, I understand the
8 practical difficulties.

9 MR. FLAXER: It's like killing my guy -- we got to
10 get that thing down.

11 THE COURT: Right. Now, look, I understand --

12 MR. FLAXER: I'm going give you a policy point
13 since, you know, Mr. Gilhuly had the (indiscernible). If
14 you take their argument, a party could publish a
15 horrendously defamatory article on a site owned by an
16 assetless company, leave it there for a week, and then move
17 it to the real site can claim, oh, you know, it's forever,
18 you know, insulated from any attack. Doesn't seem right
19 that that can be the law.

20 THE COURT: (Indiscernible) you put a timely claim
21 against the original publisher (indiscernible) and not only
22 seek damages but seek an injunction.

23 MR. FLAXER: I'm not sure that's -- they seem to
24 have a very different view.

25 THE COURT: Well, I think you could do that if you

1 put --

2 MR. FLAXER: (Indiscernible)

3 THE COURT: That's not what happened here. You
4 have the intervention of the sale order. It's the
5 equivalent of bringing the action beyond the one year
6 statute of limitations. That's essential what it is here.

7 MR. FLAXER: So --

8 THE COURT: And unless you have a new action today
9 (indiscernible) post-sale, you're late.

10 MR. FLAXER: I'm --

11 THE COURT: Let me -- you know, why don't you wrap
12 it up, it's --

13 MR. FLAXER: I only want to allude to the fact
14 that there has been requests for attorneys' fees and things
15 that kind of sound like sanctions. I hope the Court's not
16 taking any of that seriously. If you are --

17 THE COURT: I take everything seriously.

18 MR. FLAXER: All right. Then we -- if you decided
19 to reserve decision and it were not mentioned, I just want
20 to mention the fact that there's been no evidence on any of
21 that. We would like the opportunity, if it is being
22 considered to have evidence on that and a full, you know,
23 briefing, and Mr. (indiscernible). And I'll (indiscernible)
24 Mr. Ricardo.

25 THE COURT: You're up.

1 MR. RICARDO: Your Honor, Preston Ricardo for the
2 plaintiffs. The defamation issue in this case is much more
3 interesting that what people have thus far made --

4 THE COURT: Sounds pretty interesting so far,
5 okay?

6 MR. RICARDO: Well, it's much more complex and
7 it's actually a novel question that's presented under New
8 York law, and I'll tell you why.

9 THE COURT: All right.

10 MR. RICARDO: You've only heard half the story.
11 You've heard what I would agree is an accurate recitation of
12 the single publication rule and if the story ended there, it
13 may very well be that this claim would be barred. But the
14 whole crux of the issue and the argument is that the post-
15 sale conduct falls under and constitutes what is an
16 exception to the single publication rule and that's
17 republication, and republication has happened here post-sale
18 by Gizmodo and this case is not on -- and I'll tell you why
19 -- this case is not at all like the Philadelphia case does
20 apply Pennsylvania law and New York law because in that case
21 there was an acquisition and nothing new -- the Court didn't
22 address anything new that happened or that the buyer did
23 after that, which I'll get into. And those are the very
24 things, those actions are at issue here and they're -- that
25 part of the exception is acknowledged in every one of the

1 New York cases that the movement has referred to as binding
2 and I agree that we have relevant New York decisions. They
3 haven't addressed this issue but they actually favor the
4 plaintiffs, and here's why.

5 Firth is a Court of Appeals decision that you've
6 heard a lot about. That's not like this case because all
7 you had with the website (indiscernible) at issue there, the
8 website alleged defamatory article was completely unrelated
9 modification to the website, some tweak, and the Court of
10 Appeals used the example of, you know, if it were to buy
11 into some tweak to the website constituting a republication,
12 then the Court of Appeals' own website if it could
13 potentially be exposed to a republication exception claim
14 merely by virtue of the fact that the Court of Appeals adds
15 things to its website like (indiscernible) opinions.

16 THE COURT: What was the republication, though?
17 If the debtor continued to own --

18 MR. RICARDO: Yes.

19 THE COURT: -- the website, would a republication
20 have occurred in this case? And if so, when?

21 MR. RICARDO: Well, here's what -- when the
22 republication happens, and here's the fact issue and it's
23 been recognized as a fact issue by the most recent decision
24 that's been cited to this Court in these papers, and that's
25 a 2014 Etheridge-Brown decision by Judge Oetken from -- in

1 the Southern District applying New York law, he relies on
2 Firth, and you know he concludes -- he denies summary
3 judgment to American Media which had printed an alleged
4 defamatory article in the -- in hard copy of the National
5 Enquirer and then later published that article on a website,
6 and so the issue there was, was that republication.

7 THE COURT: Well, that was a separate medium,
8 right?

9 MR. RICARDO: It's a separate medium.

10 THE COURT: Here --

11 MR. RICARDO: And that's going to dovetail here
12 with what we have. I've been setting the background for
13 this.

14 THE COURT: But the argument, as I recall, the
15 allegation in the complaint is that they didn't take it down
16 after a demand.

17 MR. RICARDO: Right. And what they did instead,
18 they made it worse.

19 THE COURT: Well, but that's -- where is that
20 alleged in the complaint?

21 MR. RICARDO: The allegation in the complaint
22 about --

23 THE COURT: That they made it worse, that they did
24 something different that made it worse.

25 MR. RICARDO: Right, I'm loading (indiscernible).

1 THE COURT: Or what's the republication?

2 MR. RICARDO: The republication is -- let me just
3 read --

4 THE COURT: Are you saying it's a change --

5 MR. RICARDO: (indiscernible).

6 THE COURT: -- it's the change of ownership?

7 MR. RICARDO: It's when, and this is where it's
8 not discussed in the Philadelphia case which is critical and
9 it's discussed in every one of the New York cases as a
10 republication happens, one of the key fact issues and
11 factors is the extent to which the alleged republisher took,
12 made a conscious decision and efforts -- and these -- this
13 is quoted language essentially, I'm -- to reach a new
14 audience. So, the last -- essentially the -- almost the
15 last sentence of Judge Oetken's decision denied summary
16 judgment to American Media it is. It is plausible to infer
17 that the posting on the website of the original hard copy
18 National Enquirer article that was alleged to be defamatory
19 was done as part of a conscious effort to reach a new
20 audience. Similarly here --

21 THE COURT: Where do you allege that in the
22 complaint?

23 MAN: We're looking.

24 THE COURT: The only thing I saw in the complaint
25 is you'd asked them to take it down and they didn't take it

1 down.

2 MR. RICARDO: While they look, Your Honor, may I
3 just --

4 THE COURT: Yes.

5 MR. RICARDO: -- continue to say, similar here,
6 the Gizmodo made a conscious decision to try and reach a new
7 audience using, with this article being published, by cross-
8 promoting the Deadspin website containing the alleged --
9 what we allege is a defamatory article, to its entire new --
10 its whole customer base.

11 THE COURT: But the complaint doesn't allege that.
12 All I have to look at is the complaint here, and you're
13 arguing --

14 MR. RICARDO: We can amend that --

15 THE COURT: --that the complaint --

16 MR. RICARDO: We can amend the complaint, Your
17 Honor, to allege that the republication --

18 THE COURT: If you want -- look, if you --

19 MR. RICARDO: -- is reaching the new audience, and
20 the cross promotion which --

21 THE COURT: If you want to consent to the
22 injunction on this complaint without prejudice to file a new
23 complaint, that's fine. (Indiscernible) the relief, and
24 you'll have an opportunity to make allegations which maybe
25 are appropriate -- more appropriate for State Court because

1 it's clear that it's purely at State Court issue. But as I
2 said, you don't anything -- you don't allege what you say
3 constitutes the republication, and as I read the complaint,
4 although you say the background is important, you don't give
5 the background of the bankruptcy or the (indiscernible)
6 order or in case of Mr. Goldberg, the release, I guess. But
7 I'll hear that. But if, you know, short of that because
8 they've made the motion, short of some agreement, you know,
9 I don't -- I'll just decide the motion based on the
10 complaint.

11 MR. FLAXER: I mean, it seems to me we could agree
12 on the record to take to stay the State Court action, take
13 no further steps, give us a certain number of days to file
14 an amended complaint, and then Your Honor can decide whether
15 or not you want to have a new -- you know, a further
16 hearing, I mean that sounds like something that we could
17 out.

18 THE COURT: Mr. Gilhuly?

19 MR. GILHULY: Your Honor, you know, we've been
20 being very nice about this, but they completely wasted our
21 time and our money, a lot of money. This is ridiculous.
22 They did not allege anything that could be a republication
23 in that complaint, zero. And now they're trying to make it
24 up. They're grasping for facts. It -- I will tell you. We
25 have an order that you entered that said it bars all pre-

1 sale conduct.

2 THE COURT: Let me ask you a question. Now, let's

3 --

4 MR. GILHULY: We are telling you --

5 THE COURT: Let me just --

6 MR. GILHULY: Yes.

7 THE COURT: Assuming you're right, I agree with
8 you. All you're going to get is an injunction without
9 prejudice to file the claim that doesn't -- that's not
10 barred by the sale order.

11 MR. GILHULY: I understand they could file a new
12 complaint that would have to focus on real republication.

13 THE COURT: So, that's what they're -- that's what
14 they're proposing to do.

15 MR. GILHULY: Well, do we get attorney's fees for
16 having spent all of this money on a -- what is a frivolous -
17 -

18 THE COURT: What's the basis of the attorney's
19 fees? What's the statute or ruling that grants you
20 attorney's fees? Did you ever send them a safe harbor?

21 MR. GILHULY: No.

22 THE COURT: Okay. 9011 is out.

23 MR. GILHULY: I'm sorry?

24 THE COURT: 9011 is out.

25 MR. GILHULY: Yes. Your Honor, this was a hundred

1 (indiscernible) case. They weren't able to bring all of
2 these arguments and ask for the injunction and resolve this.
3 Instead they wait one year shy, eight months after the
4 order, and file a complaint that doesn't allege anything
5 that could constitute republication. They have wasted our
6 time and I just don't think this is a close issue at all.
7 I'm going to have Mr. Hentoff tell you why

8 THE COURT: Very briefly.

9 MR. GILHULY: Okay.

10 THE COURT: I have a very crowded courtroom and
11 we've been at this for a while now.

12 MR. HENTOFF: Thank you, Your Honor. Just very
13 briefly, Mr. Ricardo's argument was made in the plaintiff's
14 objections to our motion and we responded to it fully in our
15 reply brief, and we explained why adding a link to a general
16 website for a totally different reason is not a
17 republication. We cite the Hefner and I'm happy to rest on
18 the argument that we made.

19 THE COURT: Thank you. All right. I'll reserve
20 decision (indiscernible).

21 MS. LEVINE: Good morning, Your Honor. Sharon
22 Levine and Dipish Patel, Saul, Ewing, Arnstein, Lehr for
23 Ryan Goldberg, and if I could introduce Mr. Goldberg is in
24 court with us today. Thank you.

25 Your Honor, it's been a lengthy hearing and I

1 heard during that course that Your Honor's primary concerns
2 seem to revolve around two issues.

3 THE COURT: Well, Mr. Goldberg's issue is a little
4 different. We're not relying on the sale order, we're
5 relying on the confirmation order and specifically on the
6 release provisions in it.

7 MS. LEVINE: Correct, and I heard Your Honor
8 question willful misconduct and the terms deemed released --

9 THE COURT: Deemed. Yes.

10 MS. LEVINE: -- deemed to have received, and if we
11 could focus on those for a minute. Your Honor, as you might
12 imagine, in connection with the context of negotiating the
13 plan and the disclosure statement and the release language,
14 there was some substantial back and forth. We dealt
15 primarily through the debtors who we had understood were
16 negotiating with parties that didn't want us to get releases
17 on the other side, and were working through that language,
18 so obviously this wasn't the first language we proposed. We
19 understand why Your Honor is raising these issues, but we
20 would respectfully submit that in this context this language
21 is sufficient to protect Mr. Goldberg.

22 First, with regard to intentional misconduct, Mr.
23 Goldberg didn't borrow the company car, go out on bender and
24 hit a pedestrian.

25 THE COURT: But --

1 MS. LEVINE: He provided services in the ordinary
2 course of his business to his editors which content was
3 reviewed and then published prior to the sale. At the time
4 of the confirmation -- I think Your Honor might've been
5 asking a question, I was --

6 THE COURT: No, go ahead.

7 MS. LEVINE: At the time of the confirmation, we
8 negotiated for release language that would provide that even
9 though when they sent the responsive letter it was clear
10 that Gawker Media was going to stand behind Mr. Goldberg and
11 protect him the way they had protected, historically, all of
12 their writers with regard to content that was provided
13 through the ordinary course, that they wanted the release of
14 the indemnification claim so they could do a finite claim
15 reconciliation and pay hundred-cent dollars to everybody who
16 actually asserted claims. We understood that there seemed
17 to have been a pattern of behavior here where we were afraid
18 that separate and apart from just wanting money from the
19 Gawker settlement there were other agendas going on. So the
20 deemed, or the ability to have gotten a release, a
21 distribution, is exactly what we were looking to protect
22 here where they lie in wait, don't go after the deep pocket
23 which is Gawker, don't let the issue get resolved through
24 the Bankruptcy Court through the process, and then come
25 later after Goldberg for reasons that are not exactly clear

1 to us.

2 THE COURT: Ms. Levine, you've told me a lot of
3 things that would have to be part of an evidentiary hearing.
4 Are you implicitly conceding that deemed to receive
5 distributions is an ambiguous phrase?

6 MS. LEVINE: Your Honor, we --

7 THE COURT: I can't understand it without that
8 background.

9 MS. LEVINE: Well, two responses, Your Honor.
10 First of all, we think that Your Honor can consider the
11 entire record of the case as part of what Your Honor
12 considers in connection with this hearing.

13 THE COURT: I don't know what that means.

14 MS. LEVINE: The confirmation hearing and the
15 discussions that took place at the confirmation hearing with
16 regard to the release language. Secondly, Your Honor, we
17 think that deemed to have received needs to have meaning for
18 the --

19 THE COURT: So, what do you think it means?

20 MS. LEVINE: We think it means that if somebody
21 was a creditor or an administrative expense claimant at the
22 time that the release language was approved and chose for
23 whatever reason that we don't fully understand here not to
24 exercise that right to get paid a hundred cents on whatever
25 their claim would've been if they'd come to Court and ask

1 for the money, that they should be deemed to have received
2 that money and they should've be permitted, when Gawker the
3 deep pocket and the protector of the writer in this
4 circumstance, goes away to come after Ryan. And we would
5 respectfully submit that that was the contents -- context in
6 which the Court considered the applicability of third party
7 releases in this case.

8 THE COURT: And what you think the willfulness --
9 willful misconduct, I think is the phrase. What do you
10 think that means?

11 MS. LEVINE: Your Honor, we think you have to look
12 at it under the facts and circumstances of the case and in
13 the context of the industry.

14 THE COURT: That sounds like a factual issue,
15 though.

16 MS. LEVINE: No, no --

17 THE COURT: In other words, are you saying that I
18 can read it and know what it means without taking evidence?

19 MS. LEVINE: I think that you can, Your Honor,
20 because if we read it the way the creditor here is looking
21 to have Your Honor read it, it writes the release out of the
22 plan, okay? So, you know, willful misconduct is not
23 something that you have to first prove and defeat and win
24 and have Ryan be the victor in an underlying defamation suit
25 in order to have the release apply. Here, this is exactly

1 the type of claim that had been brought against the writers
2 prior to the time of the confirmation order and that we
3 discussed at the confirmation hearing as being exactly the
4 type of third party release and protection that the debtor's
5 counsel made as part of that hearing with regard to Your
6 Honor's consideration.

7 THE COURT: So, what is the willful -- and I
8 understand your argument that it's -- creates an exception
9 that swallows up the entire rule of the release, but what
10 was it supposed to mean?

11 MS. LEVINE: We would respectfully submit that it
12 -- what it means is the same way you look at willful
13 misconduct in any other context. It means when somebody is
14 truly acting outside the scope of their employment, like the
15 hypothetical I gave earlier where they, you know, they took
16 the company car and went on a bender or they -- you know,
17 it's the type of thing that would've caused Gawker, had it
18 survived, not to be indemnifying Ryan.

19 THE COURT: So, you think it's linked to the
20 indemnification obligation?

21 MS. LEVINE: Yes, Your Honor.

22 THE COURT: That's what was intended by the
23 parties?

24 MS. LEVINE: Yes, and that's why when Ryan and the
25 other covered writers and content provided gave up their

1 indemnification claims without also simultaneously having a
2 pot of money set aside to defend them from these types of
3 causes of action that especially in the case of Gawker, I've
4 been on everybody's radar screen. This release was included
5 in the plan.

6 THE COURT: Okay. Thank you.

7 MS. LEVINE: Your Honor --

8 THE COURT: Wait, before you go.

9 MR. GALARDI: Sorry.

10 THE COURT: Who wants to give me the context? I
11 didn't mean to cut you off, Ms. Levine. Are you done?

12 MS. LEVINE: Your Honor, there -- obviously there
13 are other arguments in the brief but --

14 THE COURT: I read it.

15 MS. LEVINE: -- we'll just rely on those.

16 THE COURT: Okay.

17 MR. GALARDI: Your Honor, again I'm stepping up as
18 the historian part of the negotiations. Your Honor, I want
19 to confirm Ms. Levine's understanding. Whenever we did this
20 --

21 THE COURT: Are you testifying now?

22 MR. GALARDI: -- I can have Mr. --

23 THE COURT: I'm not going to have an evidentiary
24 hearing now.

25 MR. GALARDI: Your Honor --

1 THE COURT: The question is whether one is
2 necessary.

3 MR. GALARDI: Your Honor, Your Honor asked me at
4 the hearing and I believe we said that this all came up in
5 the context of indemnification agreements and what the
6 company had done with their indemnification agreements.

7 THE COURT: I remember.

8 MR. GALARDI: Companies cannot indemnify people
9 for gross negligence and willful misconduct, so what we did
10 was -- and to match up with the U.S. trustee, as I think
11 we've said, is we reviewed the conduct, the letters, and
12 other than the one claim that we did bring which was against
13 (indiscernible), as you may recall, we did say because there
14 was a finding of punitives, we were very sensitive to this
15 issue and then with respect to the writers we did not
16 believe, we thought it was all within the course of their
17 conduct. So, in negotiating the releases, we made, as Mr.
18 Holden would testify at the confirmation (indiscernible) on
19 his behalf, made a determination that the releases were
20 appropriate to the writers because we believe they did not
21 act outside their authority with respect to any known claims
22 or any known letters including the letters that we had
23 received that Your Honor has gone through. That was the
24 context in which this provision was drafted. Thank you.

25 MR. FLAXER: I think where the plan is clear, the

1 other arguments that are being made on the language with
2 respect to the background and who said what to whom, I don't
3 think get implicated and we believe on the deemed to have
4 received a distribution, we think that is clear so it's not
5 necessary for the Court --

6 THE COURT: You think -- what do you think deemed
7 to have received a distribution means?

8 MR. FLAXER: I think that the Court's bar date
9 order clarifies it.

10 THE COURT: But that came before the claim.

11 MR. FLAXER: Right, but the plan specifically says
12 that it is the release ---

13 THE COURT: Who is someone who's deemed -- and I'm
14 not asking this as a rhetorical question. In your view, who
15 is someone who is deemed to have received a distribution but
16 doesn't actually receive a distribution?

17 MR. FLAXER: So, for example, someone who has a
18 claim could have the claim somehow reinstated and get a
19 different type of treatment that's not a, you know,
20 distribution but they could be deemed to have received a
21 distribution.

22 THE COURT: You mean a class that doesn't receive
23 anything is deemed to have received a distribution?

24 MR. FLAXER: Or a creditor who has their claim,
25 you know, reinstated, for example.

1 THE COURT: I've never heard it in that context.

2 MR. FLAXER: I mean --

3 THE COURT: I've never heard the -- I don't recall
4 ever hearing the phrase. I mean, it could've been in other
5 releases.

6 MR. FLAXER: I think there could be, you know, we
7 could think through lots of examples, but the fact is that
8 the bar date order, and I think it's the injunction
9 provision specifically says that subject to any other orders
10 of the Court -- here. "Upon the entry of the confirmation
11 order except as expressly provided in the plan, confirmation
12 order, or a separate order at the Bankruptcy Court." So,
13 when this comes out already in place, is the bar date order
14 that provides --

15 THE COURT: You don't file a timely claim, you
16 don't receive a distribution?

17 MR. FLAXER: And --

18 THE COURT: It's the same as the rule.

19 MR. FLAXER: And it says shall not -- sorry, my
20 finding is --

21 THE COURT: I know what it says.

22 MR. FLAXER: It's very clear that you're not
23 deemed to be -- you're not deemed to have received a
24 distribution. (Indiscernible.)

25 THE COURT: It doesn't say that. It just says you

1 don't receive a distribution on both, which is what it
2 normally says.

3 MR. FLAXER: I have it right here. I think it's
4 important. I think it's important I just read it in --

5 THE COURT: Okay.

6 MR. FLAXER: -- for the record. I thought I had
7 it right here. I apologize for the delay. I know
8 everybody's waiting.

9 So, I think it's clear that Your Honor in your
10 comments on the record made clear that the injunction in the
11 release provision should be made to be co-extensive. I --

12 THE COURT: Right.

13 MR. FLAXER: And it was not like that originally,
14 but, Your Honor insisted on that change and that change was
15 made and the injunction is abundantly clear that it only
16 applies to parties who are subject to the release and the
17 sale order -- I'm sorry, the bar date order provides that
18 all holders of claims that fail to comply with this order by
19 timely filing the proof of claim in appropriate form shall
20 not be treated as a creditor with respect to such claim
21 (indiscernible) voting and distribution. I can't imagine it
22 being more clear that we're just not subject to that release
23 and injunction.

24 THE COURT: But it's still -- you don't receive a
25 distribution, but it doesn't really answer the question what

1 it means to be deemed to receive a distribution, which is
2 what I am having trouble with.

3 MR. FLAXER: I mean, I think the bar date order
4 resolves that issue conclusively because it specifically
5 says if you don't file it, if you don't comply with the
6 order by filing a timely claim, you're not treated as a
7 creditor with respect to such claims for, dot-dot-dot,
8 distribution. How can we be deemed to have received a
9 distribution in light of this language? I don't --

10 THE COURT: Well, to be --

11 MR. FLAXER: I'm having -- I'm not seeing it.

12 THE COURT: Could mean you're a creditor who was
13 entitled to receive a distribution had you filed a timely
14 proof of claim.

15 MR. FLAXER: I mean --

16 THE COURT: Because there was no discharge in this
17 particular case because it was a liquidated case.

18 MR. FLAXER: You know, I think we can, you know,
19 fashion words to try to get around it, but I think it's very
20 clear. I just don't think it could be more clear and they,
21 you know, they haven't pointed to any -- anybody else than
22 use who could possibly be in this category. I mean this
23 notion of opening the floodgates doesn't seem to be backed
24 up by any facts. But again, I'm basing my argument on, you
25 know, a lot of smart lawyers spent a lot of time with the

1 plan. They drafted it, they knew about the earlier orders
2 of the Court. I think the words are clear and I'm -- and I
3 would submit to Your Honor that that should end the inquiry.
4 I think on the, you know, the willful misconduct is modified
5 by, is established by a final order. Doesn't say a final
6 order of any particular Court, but it says by a final order.
7 I mean, I would submit that the volitional act of publishing
8 an article seems to me like intentional conduct. They
9 didn't, you know, publish it by accident. You know, we
10 allege that this is really --

11 THE COURT: I guess an author doesn't publish it
12 because he writes it.

13 MR. FLAXER: I used the wrong word, but --

14 THE COURT: Yeah.

15 MR. FLAXER: To produce it and make it available
16 for publication is a volitional act. You know, we think
17 it's a dastardly defamation. They don't agree. You've
18 heard a lot on both sides, but you know, we believe that we
19 have a lot of equities on our side on this. I just want to
20 take one moment to -- because we've heard so much about how
21 we're wasting our time and the timing and we lay in wait --
22 or I should say lied in wait. You know, the decision to
23 pursue a defamation claim, by the way, I'm not the expert on
24 this, either. I had somebody else --

25 THE COURT: What are you an expert on?

1 MR. FLAXER: I'm beginning to wonder. Is not one
2 that you take lightly because when the article gets
3 published you kind of hope it's not going to get a lot of
4 attraction and by filing claims or bringing lawsuits you can
5 bring more attention to it than it's worth so you'll like --
6 often the decision is made to wait. Then the sale, you
7 know, process gets started. We had hoped they would see the
8 light and bring it down. They didn't. It's not uncommon
9 for an action to be brought close to the expiration of the
10 statute. We were hoping it would go away; it didn't, and we
11 thought we had to act. So, there is another side to that.
12 I'm not getting into right or wrong, it's just it's not as
13 simple as they cast it.

14 Two last quick things on -- that I'd like to point
15 out. My associated did me the favor of pointing out a case
16 in our brief on the mandatory abstention that says, absent
17 contrary to the evidence, a Federal Court may presume that a
18 State Court will operate efficiently and effectively in
19 adjudicating the matter (indiscernible) that's on Page 19.

20 And lastly, it is a request for a jury here, and I
21 think that raises even more layers and issues for Your Honor
22 to -- and that essentially, finally decide the State Court
23 issue in this context.

24 THE COURT: Thank you. Briefly.

25 MS. LEVINE: Your Honor, two quick responses. If

1 you -- I would invite the Court's attention to, in Paragraph
2 32 and then again in Paragraph 40 of the motion -- of our
3 motion itself, we quote the transcript from our confirmation
4 in the discussion about the releases and what -- and it --
5 so it sort of talks to why we need more than just actually
6 received a distribution and if you look at the language we
7 quoted in Paragraph 40, it actually references the fact that
8 this letter in this particular case was sent during the
9 course of the bankruptcy case and that there was no proof of
10 claim filed, and therefore we needed to deal with releasing
11 claims for those folks who were, for whatever reason, lying
12 in wait. In addition to that --

13 THE COURT: Where are you reading this?

14 MS. LEVINE: On Page 15 of the actual -- actually,
15 Your Honor, let me invite you to (indiscernible) on Page 11
16 at Paragraph 32 --

17 THE COURT: All right.

18 MS. LEVINE: -- quoting Mr. Galardi. "We believe
19 that anybody who would be bringing such action should have
20 brought an action or claim in the bankruptcy knowing that
21 Gawker was in bankruptcy and therefor Gawker could've dealt
22 with those claims in bankruptcy." And then it goes on, you
23 know, and it continues from there with the concept that we
24 understand that people may be choosing not to do that, and
25 that's a problem. In 40, we go on and Mr. Galardi actually

1 talked about this particular issue. "Your Honor, let me ask
2 you a question. Are there any creditors who have not filed
3 a claim, did not vote, and have not settled?" And Mr.
4 Galardi, "Yes, in the following way, and I want to be clear
5 as I mentioned, Mr. Harder mentioned maybe I'm not getting
6 it right, but -- and I hate to use the president's name but
7 we have received from one -- from one law firm that we wrote
8 an article about the president elect that never got filed in
9 this case." So, there are -- there were specific references
10 to actual claims where everybody knew about the bankruptcy
11 and everybody knew about the claims and there was an
12 affirmative decision not to bring them or deal with them in
13 the bankruptcy case and we would respectfully submit that
14 those are the claims that should be deemed to have received
15 a distribution.

16 Also, there was a reference made to the fact that
17 we don't think that this should be considered something
18 that's going to be sort of a repetitive, ongoing problem,
19 but if you take a look at the Jezebel case which we cite in
20 a footnote which is not before this Court, not only does it
21 eliminate Gawker who would've protected the writer in that
22 particular case, it was actually filed after the statute of
23 limitations, so there is a fear by the writers and that in
24 fact this is a reoccurring problem and they just really need
25 the release here to protect them, not only where people got

1 paid their hundred cents in the bankruptcy but where they
2 could've and should've come forward and should be deemed to
3 have received that distribution in the bankruptcy. Thank
4 you, Your Honor.

5 THE COURT: Thank you. Yes, sir?

6 MAN 1: Your Honor, Samuel (indiscernible) on
7 behalf of the (indiscernible) law firm. Because Your Honor
8 takes whatever the motion's wrote seriously, Your Honor was
9 correct, Rule 11 dead. Mr. Goldberg mentioned 1927, and I
10 just want to say one thing, that like Mr. Flaxer said we'd
11 like the opportunity because this raises big questions.
12 First of all, whether 1927 applies to a single complaint
13 filed in State Court. It was their decision to come to
14 Court. They could have filed a motion to dismiss. State
15 Court judges interpret Bankruptcy Court orders all the time.
16 That's number one, and they could've asked for sanctions
17 there under the (indiscernible), but they didn't.

18 Second of all, Your Honor, there's no basis as
19 Your Honor -- you know, it's not really appropriate to quote
20 Your Honor's opinions, but you quote a lot of Second Circuit
21 cases in (indiscernible) and the fact that we're sitting
22 here and discussing this for two hours and you didn't throw
23 us out in the first minute, clearly --

24 THE COURT: That would be impolite, I wouldn't do
25 that.

1 MAN 1: But --

2 THE COURT: Although I was sorely tempted.

3 MAN 1: But the bottom line is if there's any
4 consideration which you think you should never have, you
5 should give us an opportunity to brief it properly.

6 THE COURT: On this one, there are two exceptions
7 to the release that (indiscernible) is deemed to receive a
8 distribution. I'm not sure what it means. It could mean
9 that you're a creditor that didn't file a claim. It could
10 mean -- I'm not really sure what it means. The other, which
11 is more difficult, is this willful misconduct notion, and I
12 understand the -- and I think it's an ambiguous phrase. I
13 do remember the background to this. I do remember that the
14 releases were the quid pro quo for the loss of the
15 indemnification rights and maybe it is appropriate to
16 interpret that exception as the types of things that the
17 company wouldn't (indiscernible) earlier, would not be
18 statutorily required or by agreement required to indemnify,
19 but the bottom line is these are ambiguous phrases. They're
20 in the plan and I would like to hear evidence regarding the
21 negotiations of these phrases (indiscernible) relevant
22 evidence in order to interpret them and interpret the scope
23 of these exceptions to the releases. So, parties want to
24 take discovery on that issue?

25 MR. FLAXER: I mean, from our perspective, I think

1 the answer is yes. I think we would also want to brief the
2 issue that it's -- that evidence shouldn't be taken.

3 THE COURT: I've just concluded it should, to save
4 the ink.

5 MR. FLAXER: And so I -- the answer is yes, but
6 I'd like a day or two to just confer and think about that a
7 little more because I don't want to put everybody to a lot
8 of work if there's a way around it, but as I stand here now,
9 I would think the answer is yes.

10 THE COURT: All right. All right. Why don't I
11 give you 60 days to complete discovery. All right, why
12 don't you submit a new order providing for 60 days to
13 complete discovery on the two issues I mentioned. Let's say
14 the end of November because of Thanksgiving, the last day in
15 November. Give you a pre-trial conference date and then
16 I'll fix a trial or hearing date at that point.

17 MR. FLAXER: Thank you.

18 THE COURT: Let me just give you the date, submit
19 an order. Don't come on that date and tell me you've been
20 having problems with discovery. If you're having problems
21 with discovery, well me before.

22 December 12th, okay? For pretrial conference,
23 10:00. At 10:00. Okay. Thank you.

24 MR. FLAXER: Thank you, Your Honor.

25 (Whereupon these proceedings were concluded at 11:47 AM)

I N D E X

RULINGS

Page Line

Motion of Proposed Amici Curiae Society of 10 20
Professional Journalists, Reporters Coalition for
Freedom of the Press, and 19 Other Media Organizations
for Leave to File Memorandum of Law as Amici Curiae
Granted

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

Digitally signed by Sonya Ledanski
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Date: October 2, 2017